Supreme Court, U.S.
FILED
DEC 10 2008
OFFICE OF THE CLERK

No. 08-467

In the Supreme Court of the United States

JOHN DOE, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS OF THE UNITED STATES OF AMERICA AND THE HONORABLE R. JAMES NICHOLSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
MICHAEL S. RAAB
ERIC FLEISIG-GREENE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Privacy Act renders the United States liable for the disclosure of information not retrieved from an agency record contained in a system of records, but rather from the memory of the disclosing individual.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Bartel v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984) 5, 8, 12, 13, 14
Doe v. *Chao*, 540 U.S. 614 (2004) 2
Doyle v. *Behan*, 670 F.2d 535 (5th Cir. 1982) 9
Krieger v. *Fadely*, 199 F.R.D. 10 (D.D.C. 2001) 10
Olberding v. *United States DoD*, 709 F.2d 621 (8th Cir. 1983) 4, 5, 8, 10, 15
Orekoya v. *Mooney*, 330 F.3d 1 (1st Cir. 2003) 8
Thomas v. *United States Dep't of Energy*, 719 F.2d 342 (10th Cir. 1983) 8
Wilborn v. *Department of Health & Human Servs.*, 49 F.3d 597 (9th Cir. 1995) 5, 8, 12, 13, 14

Statutes:

Privacy Act, 5 U.S.C. 552a 1
5 U.S.C. 552a(a)(2) 2
5 U.S.C. 552a(a)(4) 2
5 U.S.C. 552a(a)(4)-(5) 11
5 U.S.C. 552a(a)(5) 2, 7
5 U.S.C. 522a(b) 2, 7, 9, 15

Statutes—Continued: Page

5 U.S.C. 552a(c)(1) 2, 6, 10
5 U.S.C. 552a(d) 2, 6, 10
5 U.S.C. 552a(e)(1) 10
5 U.S.C. 552a(e)(1)-(12) 2, 6
5 U.S.C. 552a(e)(10) 10
5 U.S.C. 552a(f) 2, 6
5 U.S.C. 552a(g)(1) 2
5 U.S.C. 552a(g)(4) 2
5 U.S.C. 552a(i) 3, 11
Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896 6

Miscellaneous:

40 Fed. Reg. (1975):
p. 28,951 11
p. 28,952 11
Office of Legal Policy, U.S. Dep't of Justice, *Overview of the Privacy Act of 1974* (May 2004) <http://www.usdoj.gov/olp/ 04_7_1.html> 14
S. Rep. No. 1183, 93d Cong., 2d Sess. (1974) 8

In the Supreme Court of the United States

No. 08-467

JOHN DOE, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS OF THE UNITED STATES OF AMERICA AND THE HONORABLE R. JAMES NICHOLSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 519 F.3d 456. The opinion of the district court (Pet. App. 20a-32a) is reported at 474 F. Supp. 2d 1100.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2008. A petition for rehearing was denied on July 10, 2008 (Pet. App. 33a-34a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Privacy Act, 5 U.S.C. 552a, prohibits certain agency disclosures of "any record which is contained in

a system of records" without prior written consent of the individual to whom the record pertains. 5 U.S.C. 552a(b). The Act defines the term "record" to include "any item, collection, or grouping of information" about a United States citizen or lawful permanent resident alien that is "maintained by an agency" and contains an individual identifier, such as the individual's name, identifying number, or photograph. 5 U.S.C. 552a(a)(2) and (4). A "system of records" consists of any group of records that is "under the control of [an] agency" and "from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. 552a(a)(5).

The Act requires any agency maintaining a system of records to abide by various recordkeeping requirements to ensure the quality, integrity, and security of information as it is collected and used. 5 U.S.C. 552a(e)(1)-(12). Agencies must also establish procedures permitting individuals to review and seek correction of any records pertaining to them. 5 U.S.C. 552a(d) and (f). The Act further mandates that agencies accurately account for disclosures of covered records, including the date, nature, and purpose of each disclosure. 5 U.S.C. 552a(c)(1).

If an agency fails to comply with the Privacy Act or implementing regulations in a manner that adversely affects an individual, that individual may seek redress through a civil action against the agency. 5 U.S.C. 552a(g)(1). In certain instances where the failure is "intentional or willful," the Act provides for recovery of the individual's actual damages, amounting to no less than $1000, along with costs and reasonable attorney fees. 5 U.S.C. 552a(g)(4); see *Doe* v. *Chao*, 540 U.S. 614,

618-627 (2004). The statute establishes criminal penalties for willfully disclosing or deceptively requesting agency records, as well as for maintaining a system of records without publishing notice of its existence in the *Federal Register*. 5 U.S.C. 552a(i).

2. From July 2000 to September 2004, petitioner John Doe worked as a housekeeping aide at the Minneapolis Veterans Affairs Medical Center (Medical Center). Pet. App. 3a, 22a. During a required pre-employment medical examination, the results of which were included in his files, petitioner revealed that he had been diagnosed with the human immunodeficiency virus (HIV). *Id.* at 3a. In 2002 and 2003, petitioner sought treatment on several occasions from the Medical Center's employee health service. *Id.* at 3a, 22a. On one of those visits, in September 2002, petitioner was treated by and discussed his HIV status with Dr. Samuel Hall. *Ibid.* Petitioner saw Dr. Hall again in February 2003; at that appointment, petitioner once more disclosed his HIV status and also revealed to Dr. Hall that he had smoked marijuana to increase his appetite. *Ibid.* Dr. Hall recorded that information in petitioner's employee health file. *Id.* at 3a.

In late February 2003, petitioner's supervisor spoke with Dr. Hall about petitioner's frequent absences from work. Pet. App. 23a. As a result of that conversation, petitioner's supervisor scheduled another meeting between petitioner and Dr. Hall, to which petitioner invited his union representative. *Id.* at 4a, 23a. In his current suit, petitioner alleges that he instructed Dr. Hall to avoid discussing his medical information in front of his union representative, a charge that Dr. Hall denies. *Id.* at 4a. During the course of the meeting, Dr. Hall mentioned both petitioner's HIV status and his

marijuana use in the presence of petitioner's union representative. *Ibid.*

3. Petitioner brought suit against the Department of Veterans Affairs and its Secretary, alleging that Dr. Hall had violated the Privacy Act by disclosing information in petitioner's employee health file to his union representative without petitioner's consent. Pet. App. 4a.[1] The district court granted summary judgment for the government, holding that the Privacy Act did not forbid the disclosures at issue here because Dr. Hall had not obtained the relevant information from an agency record within a system of records. *Id.* at 26a. Relying on the Eighth Circuit's decision in *Olberding* v. *United States Department of Defense*, 709 F.2d 621 (1983) (per curiam), the district court reasoned that "the purpose of the Privacy Act is to 'preclude a system of records from serving as the *source* of personal information about a person that is then disclosed without the person's prior consent.'" Pet. App. 27a (quoting *Olberding*, 709 F.2d at 622). Noting that Dr. Hall had obtained knowledge of petitioner's HIV status and marijuana use through conversations with petitioner himself, rather than by retrieving that information from an agency record, the court concluded that Dr. Hall's disclosure did not violate the Privacy Act. *Id.* at 31a.

4. The court of appeals affirmed. Pet. App. 1a-19a. The court concluded that no Privacy Act violation had occurred in this case because Dr. Hall had not disclosed an agency record to petitioner's union representative, but rather had revealed information he recalled from his own memory of earlier discussions with petitioner. *Id.*

---

[1] Petitioner originally named Dr. Hall as an additional defendant, but he later stipulated to dismissal without prejudice of the claims against Dr. Hall. Pet. App. 21a n.2.

at 7a. The court explained that "the only disclosure actionable under section 552a(b) is one resulting from a retrieval of the information initially and directly from the record contained in the system of records." *Id.* at 8a (quoting *Olberding*, 709 F.2d at 622). Under that standard, the court held, Dr. Hall's disclosure did not implicate the Privacy Act: Although the information Dr. Hall disclosed was also contained in the agency's records, Dr. Hall had not obtained the information from that source. *Id.* at 9a.

Relying on its prior decision in *Olberding*, the court of appeals rejected petitioner's contention that the Privacy Act encompasses disclosures based on the personal recollections of individuals who have helped to prepare agency records. Pet. App. 10a. Petitioner relied in part on *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984), and *Wilborn* v. *Department of Health & Human Services*, 49 F.3d 597 (9th Cir. 1995), but the court found those cases to be distinguishable. See Pet. App. 10a-12a. In those cases, the court of appeals stated, "an employee's personal information was acquired from an agency's system of records and eventually released by officials involved with the data retrieval" as part of an investigation of the employee. *Id.* at 11a. The court concluded that, because "Dr. Hall's knowledge came from [petitioner] himself rather than from the doctor's use of the Medical Center's information collection system," petitioner's situation "does not present the same concerns [as in *Bartel* and *Wilborn*] about threats to privacy from misuse of the government's sophisticated systems for collecting and storing personal information." *Ibid.*

In a portion of Judge Murphy's opinion that the other panel members did not join, Judge Murphy expressed the view that the Eighth Circuit's reading of the

Privacy Act in *Olberding* was consistent not only with the text of the Act, but also with Office of Management and Budget (OMB) guidelines and with the overarching congressional purpose "to protect the privacy of individuals identified in information systems maintained by Federal agencies." Pet. App. 13a (quoting Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896). Judge Hansen concurred in the judgment. *Id.* at 14a-19a. He agreed that the court's disposition of the case was compelled by the Eighth Circuit's prior decision in *Olberding*. *Id.* at 15a. Judge Hansen indicated, however, that if he were not constrained by circuit precedent, he would interpret the Privacy Act to encompass "disclosures made by the author of a record of information the author learned and recorded in the course of creating the record." *Id.* at 17a. Judge Hansen characterized that construction as a "scrivener's exception" to the general rule that the Privacy Act covers only disclosures of information that is actually retrieved from an agency record. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The Privacy Act focuses exclusively on the maintenance and protection of records within the possession and control of federal agencies. The Act sets forth particular requirements to ensure the quality, integrity, and security of agency systems of records, 5 U.S.C. 552a(e)(1)-(12), and mandates that agencies police the access and amendment of records contained in those systems, 5 U.S.C. 552a(c)(1), (d) and (f).

The Privacy Act provision that is directly at issue here states that, with various exceptions not at issue in this Court, "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. 552a(b). By its terms, Section 552a(b) does not encompass all personal information that may come to be known by an agency official, but rather applies to disclosures of any "record which is contained in a system of records." The Act defines the term "system of records" to include only those collections of records that are both "under the control of [an] agency" and "from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. 552a(a)(5).

The conduct at issue in this case did not violate the Privacy Act because it did not involve disclosure of any "record which is contained in a system of records." As the court of appeals noted, Dr. Hall did not access data contained within the agency's system of records prior to making his disclosure, nor did he derive from such records his knowledge of petitioner's medical history. Pet. App. 7a. Rather, Dr. Hall's knowledge was drawn from his own memory of face-to-face interactions that occurred when petitioner sought treatment from the Medical Center's health service. Dr. Hall's recollection was not "under the control of [an] agency" or "retrieved by the name of the individual or by some identifying * * * particular." 5 U.S.C. 552a(a)(5). Thus, while the information that Dr. Hall disclosed *corresponded* to in-

formation contained in an agency record, Dr. Hall did not disclose the record itself.

The history and purpose of the Privacy Act confirm that conclusion. As the Senate Report explained, Congress's goal in enacting the Act was to "establish[] certain minimum standards for handling and processing personal information maintained in the data banks and systems of the executive branch, for preserving the security of the computerized or manual system, and for safeguarding the confidentiality of the information." S. Rep. No. 1183, 93d Cong., 2d Sess. 2 (1974). Imposition of liability for disclosing information that agency officials acquire through independent means, simply because that information also appears in agency records, would go well beyond what is necessary to achieve that congressional purpose. See Pet. App. 9a.

For those reasons, the Privacy Act is not implicated simply because Dr. Hall's recollection coincides with information in an agency record. Petitioner contends (Pet. 18) that a disclosure is actionable under the Privacy Act so long as the information being disclosed is contained in an agency record, regardless of the means by which the disclosing official learned of the information. That argument is contrary to the Act's text, structure, and purpose, and it has been uniformly rejected by the courts of appeals, which hold that the Act generally does not apply to information that is found in, but was not drawn from, the contents of agency records. See *Orekoya* v. *Mooney*, 330 F.3d 1, 6 n.3 (1st Cir. 2003); *Wilborn* v. *Department of Health & Human Servs.*, 49 F.3d 597, 600 (9th Cir. 1995); *Bartel* v. *FAA*, 725 F.2d 1403, 1408 (D.C. Cir. 1984); *Thomas* v. *United States Dep't of Energy*, 719 F.2d 342, 345 (10th Cir. 1983); *Olberding* v. *United States DoD*, 709 F.2d 621, 622 (8th

Cir. 1983) (per curiam); *Doyle* v. *Behan*, 670 F.2d 535, 538-539 (5th Cir. 1982) (per curiam).

Petitioner also suggests (Pet. 19) that, even if the Privacy Act is ordinarily inapplicable to disclosures of information that the discloser did not retrieve from an agency record, that general rule should be subject to a "scrivener's exception." Under the "scrivener's exception," as described in Judge Hansen's concurring opinion in this case, the Privacy Act would apply "to disclosures made by the author of a record of information the author learned and recorded in the course of creating the record." Pet. App. 17a. That proposed exception, however, has no sound basis in the statutory text. As the court of appeals explained, "Section 552a(b) does not prohibit disclosure of information independently acquired," and agency officials' "[p]ersonal knowledge and memories are not included in the terminology or definitions of the Act." *Id.* at 12a. So long as the person responsible for the disclosure acquired the relevant information through means independent of an existing agency record, his conduct does not constitute disclosure *of the record* and therefore is not prohibited by the Act, even if the discloser also plays a role in the record's creation.

In this case, the Privacy Act clearly would not apply if information concerning petitioner's medical condition and marijuana use had never been committed to writing. In that event, the information would exist only in Dr. Hall's memory and would not constitute a "record which is contained in a system of records." 5 U.S.C. 552a(b). Although Dr. Hall's disclosure of such information could be subject to rules of medical ethics, it would not implicate the Privacy Act. That result does not change simply because, after learning the information, Dr. Hall

reduced his knowledge to writing and created a record for inclusion in petitioner's employee health file. Under either scenario, Dr. Hall's memory of the conversation with petitioner is independent of the record containing the same information, and the mere existence of the latter does not alter the status of the former under the Privacy Act. See, *e.g.*, *Krieger* v. *Fadely*, 199 F.R.D. 10, 13 (D.D.C. 2001) ("The Privacy Act speaks to the disclosure of records; it does not create a monastic vow of silence which prohibits governmental employees from telling others what they saw and heard merely because what they saw or heard may also be the topic of a record in a protected file.").

2. Petitioner's proposed construction of the Act would also place unwarranted burdens on federal agencies. It is one thing to mandate that agencies limit access to their own tangible systems of records, but quite another to task agencies with restricting access to their employees' (or former employees') memories independent of any examination of the agencies' record systems. As the court of appeals noted, the latter requirement "would create an 'intolerable burden,'" imposing myriad obligations over sources of information that agencies cannot be reasonably expected to control or even know of. Pet. App. 9a (quoting *Olberding*, 709 F.2d at 622).

The Privacy Act mandates, for example, that agencies "keep an accurate accounting" of any disclosure of agency records, 5 U.S.C. 552a(c)(1); permit individuals to access, review, and request the correction of such records, 5 U.S.C. 552a(d); strictly limit the type and amount of information maintained in such records, 5 U.S.C. 552a(e)(1); and establish appropriate safeguards to ensure the security and confidentiality of such records, 5 U.S.C. 552a(e)(10). Those requirements would

be extremely onerous, and in many instances unworkable, if the term "records" were construed to include any individual's knowledge that corresponded to data in an agency's system of records. Such a reading would also effect a sweeping expansion of the statute's criminal prohibitions—which proscribe any willful disclosure of or deceptive request for agency records, as well as the maintenance of any system of records without publishing notice of its existence in the Federal Register. 5 U.S.C. 552a(i).

The Privacy Act's definition of the term "record which is contained in a system of records" is limited to items that are "maintained by an agency" and "under the control of [an] agency." 5 U.S.C. 552a(a)(4)-(5). The OMB's implementing guidelines for the Act, published contemporaneously with the statute's enactment, make clear that the Act's reference to information "maintained by" and "under the control of" an agency was intended to exclude information within the personal control of agency employees, "over which the agency exercises no control or dominion." 40 Fed. Reg. 28,952 (1975). The guidelines further explain that, for similar reasons, a record is limited to "a tangible or documentary record (as opposed to a record contained in someone's memory)." *Id.* at 28,951.[2] That guidance rein-

---

[2] Petitioner notes (Pet. 21) that those definitions concern whether information qualifies as a "record which is contained in a system of records," rather than whether a "disclosure" has occurred. But that is precisely the issue here. Neither party disputes that Dr. Hall "disclosed" *information* to petitioner's union representative; the pertinent question is whether Dr. Hall disclosed an agency *record*. As the court of appeals correctly recognized, the answer to that question turns on whether the information that Dr. Hall disclosed "had been retrieved from a record covered by the Act." Pet. App. 7a.

forces the natural reading of the statutory text—that an agency employee's memory of information, not itself retrieved from an agency record, does not fall within the scope of the Privacy Act.

3. Petitioner contends (Pet. 12-17) that the ruling below conflicts with the decisions in *Bartel*, 725 F.2d at 1403, and *Wilborn*, 49 F.3d at 597. No circuit conflict exists. The courts in both those cases acknowledged that the Privacy Act generally renders the United States liable only for unauthorized disclosure of information directly retrieved from an agency system of records, and both cited the Eighth Circuit's decision in *Olberding* approvingly on that point. See *Bartel*, 725 F.2d at 1408; *Wilborn*, 49 F.3d at 600. Although the courts in *Bartel* and *Wilborn* recognized a narrow exception to the "retrieval" rule on which the Eighth Circuit relied here (see Pet. App. 7a), the exception as those courts articulated it would not cover the circumstances of this case.

In *Bartel*, an agency official ordered an investigation into the plaintiff's allegedly wrongful activities, and "[d]ocuments collected pursuant to that investigation were placed in a Report of Investigation." 725 F.2d at 1405. The official then "made a putative determination of wrongdoing based on the investigation, and disclosed that putative determination in letters purporting to report an official agency determination." *Id.* at 1411. The court concluded that, "where an agency official uses the government's 'sophisticated . . . information collecting' methods to acquire personal information for inclusion in a record and then discloses that information in an unauthorized fashion," the Privacy Act applies even if the official does not "physically retriev[e]" the relevant information "from the record system." *Id.* at 1410.

In *Wilborn*, an administrative law judge (ALJ) conducted an analysis of the plaintiff's job performance "using statistical data from the agency's records." 49 F.3d at 599. The ALJ subsequently wrote a performance improvement plan (PIP) for the plaintiff, expunged all files relating to the plan at the agency's direction, and then disclosed the plan's existence in a written opinion. *Ibid.* The court of appeals held that "even though the ALJ may not have physically retrieved the disclosed information from Wilborn's personnel file, he violated the Privacy Act by using the [agency's] sophisticated information collecting methods to acquire personal information for inclusion in the PIP, and then disclosing the existence of the PIP and its contents in an unauthorized fashion." *Id.* at 601.

As the court below recognized, *Bartel* and *Wilborn* "are readily distinguishable from [petitioner's] case." Pet. App. 11a. Dr. Hall did not use his agency's "sophisticated information collecting methods," *Wilborn*, 49 F.3d at 601; see *Bartel*, 725 F.2d at 1410, to acquire information about petitioner's medical condition and marijuana use. Rather, Dr. Hall acquired that information through face-to-face interactions with petitioner himself. This case therefore is not covered by the D.C. and Ninth Circuits' limited exception to the "retrieval rule."

The courts in *Bartel* and *Wilborn* repeatedly highlighted the limited nature of their rulings. Thus, in *Bartel*, the D.C. Circuit emphasized that its reasoning stemmed from the "peculiar set of circumstances" at issue, which involved "disclosure by an agency official of his official determination made on the basis of an investigation which generated a protected personnel record." 725 F.2d at 1409; see *id.* at 1408 (noting the "peculiar circumstances of this case"); *id.* at 1409 (concluding that

"a rigid adherence to the 'retrieval standard' makes little sense *in this case*"); *ibid.* (court "decline[s] to rule, *in the factual context of this case*, that the Act's coverage is restricted to information directly retrieved from a tangible recording"). Similarly, the Ninth Circuit in *Wilborn* limited its holding to "the peculiar facts of this case." 49 F.3d at 600; see *id.* at 601 (emphasizing that the court's holding was "based on the unusual and egregious facts of this case"). In addition, both the D.C. and Ninth Circuits specifically acknowledged the Eighth Circuit's prior decision in *Olberding*, the precedent on which the court below relied, and distinguished that case on the ground that it "d[id] not apply to the facts" before them. *Wilborn*, 49 F.3d at 601; see *Bartel*, 725 F.3d at 1409 & n.11 (explaining that cases from other circuits, including *Olberding*, are inapposite because "none involved the peculiar set of circumstances present here").[3]

4. Even if some tension existed between the decision below and the rulings in *Bartel* and *Wilborn*, the question presented would not be of sufficient practical importance to warrant this Court's review. Precisely because the courts in *Bartel* and *Wilborn* made clear their intent to announce only a limited exception to the general "retrieval rule," any disagreement concerning the exact

---

[3] Petitioner relies (Pet. 15-16) on a document published by a component of the Department of Justice, entitled "Overview of the Privacy Act of 1974," to bolster his assertion of a circuit split. That document does not endorse the holdings in *Bartel* and *Wilborn*, but simply describes those decisions in language drawn largely from the courts' opinions. Nothing in those descriptions purports to diminish the heavy emphasis by the D.C. and Ninth Circuits on the highly contextual, fact-bound character of the rulings. See Office of Legal Policy, U.S. Dep't of Justice, *Overview of the Privacy Act of 1974* (May 2004) <http://www.usdoj.gov/olp/04_7_1.html>.

scope of that exception is unlikely to affect the outcome of a significant number of cases.

Petitioner is incorrect, moreover, in asserting (Pet. 11, 13) that the decision below "created" the purported disagreement he identifies. The Eight Circuit's decision in this case broke no new ground but rather followed from that court's 25-year-old ruling in *Olberding*, which rejected the same exception petitioner now proposes and declared that "the only disclosure actionable under Section 552a(b) is one resulting from a retrieval of the information initially and directly from the record contained in the system of records." 709 F.2d at 622. The decisions in *Bartel* and *Wilborn* were issued in 1984 and 1995 respectively. If (as petitioner contends) those decisions are inconsistent with the court of appeals' ruling here, the disagreement among the circuits has persisted for a substantial period of time without causing any widespread disruption in the administration of the Privacy Act. The absence of any indication that the question presented in this case recurs with meaningful frequency provides an additional reason for this Court to deny review.[4]

---

[4] Petitioner contends (Pet. 27-29) that the Eighth Circuit's ruling in this case threatens to harm the doctor-patient relationship. Petitioner's concerns are addressed by applicable rules of medical ethics and by any statutory provisions specifically designed to govern such matters. Although the Privacy Act provides additional protection against disclosure of medical information that is retrieved from federal agency records, it was not intended to address breaches of patient confidentiality in circumstances not involving such retrieval.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
MICHAEL S. RAAB
ERIC FLEISIG-GREENE
Attorneys

DECEMBER 2008